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Shelby T. Denton, Glenn Schilling, George B.
Simpson, Darryl T. Owens and Steve Robbins

Appellee's Brief 1976-SC-0002

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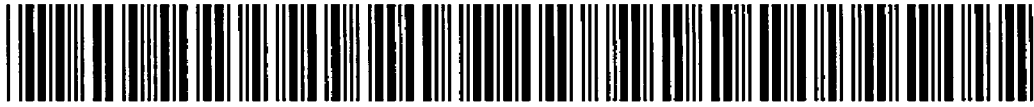
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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-2

**FALCON COAL COMPANY and
GEORGE WAGONER, Acting Commissioner and
Custodian of the Special Fund - - Appellants**

versus

**GEORGE DUNCIL and
THE WORKMEN'S COMPENSATION BOARD
OF KENTUCKY, Composed of Shelby T. Den-
ton, Glenn Schilling, George B. Simpson, Darryl
T. Owens and Steve Robbins - - - Appellees**

APPEAL FROM THE PERRY CIRCUIT COURT
HON. DON A. WARD, JUDGE

BRIEF FOR APPELLEE, GEORGE DUNCIL
FILED

MAR 5 1976

MARTHA LAYNE COLLINS
CLERK

H. GARLAND WELLS
P. O. Box 956
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Attorney for Appellee

~~SUPREME COURT~~
This is to certify that true copies of the within Brief have been mailed, postage prepaid, to Hon. J. W. Craft, Jr., P. O. Drawer 1017, Hazard, Kentucky 41701; to Hon. Kenneth E. Hollis, Special Fund, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky, 40202; to Hon. William L. Huffman, Department of Labor, Frankfort, Kentucky 40601; and to Hon. Don A. Ward, c/o Perry Circuit Court, Perry County Courthouse, Hazard, Kentucky 41701; all this 4th day of March, 1976.



Attorney for Appellee

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

- (1) Whether or not the finding of the Kentucky Workmen's Compensation Board to the effect that Appellee gave due and timely notice is clearly erroneous.
- (2) Whether or not the finding of the Kentucky Workmen's Compensation Board that Appellee became totally and permanently disabled on or about June 3, 1972 as the result of an occupational disease of coal miners is clearly erroneous.

SUPREME COURT OF KENTUCKY

File No. 76-2

FALCON COAL COMPANY and
GEORGE WAGONER, Acting Commissioner and
Custodian of the Special Fund - *Appellants*

v.

GEORGE DUNCIL and
THE WORKMEN'S COMPENSATION BOARD OF
KENTUCKY, Composed of Shelby T. Den-
ton, Glenn Schilling, George B. Simpson,
Darryl T. Owens and Steve Robbins - *Appellees*

APPEAL FROM THE PERRY CIRCUIT COURT
HON. DON A. WARD, JUDGE

BRIEF FOR APPELLEE, GEORGE DUNCIL

May it please the Court:

I

STATEMENT OF THE CASE

The Appellee, George Duncil, accepts as correct the Statement of the Case contained in Appellants' brief.

II

ARGUMENT

- (1) **Whether or Not the Finding of the Kentucky Workmen's Compensation Board to the Effect That Appellee Gave Due and Timely Notice Is Clearly Erroneous.**

The question of due and timely notice was raised by both appellants in their briefs before the Workmen's Compensation Board; and their arguments were responded to by appellee, George Duncil, in his Reply Brief before the Board. We quote that portion of that Reply Brief dealing with this question.

(1) "It is argued that plaintiff failed to give due and timely notice to the defendant company. This argument appears to be premised primarily on a misconception of fact. It is stated that plaintiff began receiving Federal Black Lung Benefits in March or April of 1973, some eight or nine months before the filing of his claim. The fact is these payments commenced in March or April of 1974, some two or three months after he filed his claim. The hearing on this claim was held on June 21, 1974. Plaintiff testified he began receiving Federal black lung benefits about three months before this hearing (T.E., p. 17, Q. 91). If we accept the suggestion of the Special Fund that notice should have been given to the defendant coal company upon receipt of Federal black lung benefits, then the argument of the Special Fund falls of its own weight.

(2) "It is also suggested by the Special Fund that the report of Dr. O'Neill dated May 14, 1973 should have served as notice to him, and that he should not have waited until November to give his

employer notice of it. Aside from the fact that we are only talking about a period of six months (we do not understand the basis of the Funds' statement that six to *eight* months are involved), it should be noted that this record is totally devoid of any evidence that plaintiff had any understanding of the contents of the report of Dr. O'Neill. There is no evidence here upon which such a finding could be based. There is, however, evidence in the record that strongly tends to show he did not have such understanding. We refer to the answer to Question 4 on page 19 of the Transcript of Evidence:

Q. 4. When you went to see Dr. O'Neill and Dr. Jones in 1973 did they advise you to stay away from that dust?

A. Dr. Jones did. O'Neill never said nothing about it.

"The record shows that plaintiff saw Dr. Jones on October 24, 1973. It is highly significant that within a month of the time that plaintiff had been advised to avoid further contact with harmful dusts he had begun to take steps to protect his rights and to perfect his claim. It is submitted that the foregoing facts clearly indicate that plaintiff's first knowledge of his condition came with his visit to Dr. Jones."

Faced with the arguments of appellants and the response thereto by appellee, George Duncil, the Board entered this finding:

"5. *That defendant had due and timely notice of plaintiff's claim.* Quite remarkably this was stipulated (T. E., pg. 4) and then raised diffusely in briefs by both the Special Fund and the em-

ployer. *We would have resolved the issue for the plaintiff if it had not been stipulated.*" (Emphasis ours.)

Part of appellants' argument under the first subsection of their Brief relates to the question of whether their stipulation amounted to a waiver of the notice requirement. In view of the first and last sentences of the finding above quoted, this argument is irrelevant; and the question here is whether the finding of due and timely notice is clearly erroneous.

The Workmen's Compensation Board had before it this whole record and it had before it the conflicting interpretations of that record presented by the parties. It resolved that conflict in favor of appellee, George Duncil, and found due and timely notice had been given. That finding is supported by substantial evidence, and is therefore, binding on all the parties to this action and is binding on this Court. *Blue Diamond Coal Company v. Terry*, Ky., 416 S. W. 2d 350.

One additional comment is made necessary because of a statement appearing on page 5 of appellants' brief. There it is said, "Appellee received a report from Dr. O'Neill, who examined him at the request of Appellee's counsel, . . ." The statement that Appellee was examined at the request of Appellee's counsel has no support in this record. The record is silent as to whether Appellee went to Dr. O'Neill on his own initiative or whether he was referred to him by someone else. However, this Court is advised that Appellee was not referred to Dr. O'Neill by this attorney.

(2) Whether or Not the Findings of the Kentucky Workmen's Compensation Board That Appellee Became Totally and Permanently Disabled on or About June 3, 1972 as the Result of an Occupational Disease of Coal Miners Is Clearly Erroneous.

Although the argument of Appellants is not couched in precisely these terms, the thrust of their argument under the second subsection of their Argument is that the finding of the Workmen's Compensation Board to the effect that Appellee became totally and permanently disabled on or about June 3, 1972 as the result of an occupational disease of coal miners is clearly erroneous. This argument overlooks all the medical evidence introduced by Appellee, and, particularly, the clear and unequivocal medical judgment of Dr. Boyce E. Jones to the effect that as of June 3, 1972 Appellee was permanently and totally disabled for all labor in coal mining or in any other dusty atmosphere, and for work requiring heavy labor in any environment.

"36. All right, Doctor, you I think may have pretty well answered this already, but I will ask it anyway. You have stated that this is a permanent condition or is one which is progressive. What is the outlook or prognosis for an individual once he develops this disease if he continues to work in a dusty atmosphere such as that found in the coal mines?

A. Prognosis is very poor since this is a progressive disease and this disease could be expected that it may progress more and bring about further breathing impairment without further injurious dust exposure, but if this individual does have further injurious dust exposure then it would

be expected that his disease would progress more rapidly in a shorter period of time, and if this injurious exposure continues long enough it could cause enough scar tissue in the lungs to bring about obstruction to the extent that he could develop right heart failure and die.

37. Based on that then, Doctor, is it recommended or not recommended from a medical standpoint that once this disease is found to be present should that individual continue to expose himself to the coal mines?

A. Once there is X-ray evidence of this disease found present we advise this person to avoid all further contact to such irritating dusts and consider them as a total and permanent disability for any type of work or employment in or around the coal mines or in any area where they would have further injurious dust exposure.

38. You have set out in your report the results of the ventilatory function studies, were those results within normal limits?

A. No, sir, my findings indicated abnormalities and to the extent that this man—this indicates breathing impairment to the extent that this man would be unfit for heavy exertional activities in any environment.

39. Doctor, the evidence in this case is that Mr. Duncil last worked on in June, 1972 would you be able to state from your examination to a reasonable medical certainty whether or not on that date Mr. Duncil was afflicted with this pneumoconiosis and whether or not he was disabled in the manner which you have described?

A. Of course, even though we say this is considered progressive disease without further dust exposure, I am sure that had this man had chest X-ray made at the time he stopped working in the dusts in June of 1972 and they could have been

compared to the X-ray I made that the diagnosis would have been the same and the disability would be considered the same because I don't think there would have been enough change in progression in the disease to brought about any changes that would have changed my findings on that during that short period of time" (Jones Depo., pp. 11-13, Qs. 36-39).

It simply cannot be successfully argued that the medical evidence in this record, including the testimony of Dr. Jones, does not present a substantial basis in fact for the Board's finding of disability as of June 3, 1972. As was the case with respect to notice, the Board's finding with respect to the onset of disability is binding on all the parties and on this court. *Deby Coal Co. v. Roark*, Ky., 360 S. W. 2d 511.

III

CONCLUSION

It is respectfully submitted that the Judgment of the Perry Circuit Court be affirmed and that this matter be remanded to the Kentucky Workmen's Compensation Board so its Award may be effectuated.

Respectfully submitted,

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